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June 23, 2023

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Eknes-Tucker v. Governor of the State of Alabama*, No. 22-11707
Response to Plaintiffs' Rule 28(j) Supplemental Authority Letter Concerning *Brandt v. Rutledge*, No. 4:21-cv-450 (E.D. Ark. June 20, 2023).

Dear Mr. Smith:

Defendants have already explained why the *Brandt* court erred in granting a preliminary injunction (and why a panel of the Eighth Circuit erred in affirming that injunction): because "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other." Reply Br. 19 (quoting *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022) (cleaned up)).

At least the *Brandt* court's initial error pre-dated *Dobbs* (though not *Geduldig*). But that makes it all the more remarkable that its latest decision simply repeats its prior Equal Protection analysis thought for thought, without one citation to the Supreme Court's decision. For the *Brandt* court, as for the *Ladapo* court before it, it is as though *Dobbs* doesn't exist—wished away so that federal courts must defer to medical interest groups rather than the legislative bodies charged with regulating medicine. The *Brandt* court relied on *Bostock* and its Title VII analysis to find that Arkansas's regulation unlawfully discriminated "on the basis of sex" under the Equal Protection Clause, Op.65—even though half of the non-recused judges of the en banc Eighth Circuit have explained why "there is reason to be skeptical that" *Bostock*'s reasoning "reach[es] so far." *Brandt v. Rutledge*, No. 21-2875, 2022 WL 16957734, at *1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., joined by Gruender, Erickson,

Grasz, Kobes, JJ., dissenting from denial of rehearing en banc). Their citation? *Dobbs*. *Id.*

Like Plaintiffs, the court decisions Plaintiffs trot out as supplemental authority have no answer to *Dobbs*'s instruction that a State's medical regulation "is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." 142 S. Ct. at 2245. As with "other health and safety measures," *id.* at 2246, rational-basis review applies. And the State had ample reason to protect children from interventions that, as even the *Brandt* court found, "can cause infertility" and "limit" sexual function. Op.39-40, 70. This Court should follow *Dobbs*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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2. In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on June 23, 2023, using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

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